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MOHD SUFIAN SAPRI v. HERI SALLEH & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[CIVIL APPEAL NO: SDK-12BNCvC-2-3-2023]
8 APRIL 2024

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Abstract – *(i) Unless shown to be the proximate cause of the injuries, the lack of a driving licence on the part of the motorist ought not to be a factor to be considered in apportioning liability. Further, a mere submission that a motorist must have been riding his motorcycle fast, for otherwise he would have been able to avoid colliding with the other vehicle, when it is not supported by any evidence, was not sufficient to prove that there had been speeding; (ii) In considering parties' arguments on the issue of damages, the court is entitled to consider evidence of expert witnesses from both parties. In determining the life expectancy of a 21-year-old who is suffering from severe traumatic spinal injury and paralysis caused by the accident, for the purpose of computing future loss and damages, in a scenario where both experts agree that advancement of technology and healthcare has increased over the past decade, a fair multiplier ought to be fixed.*

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TORT: *Damages – Quantum of damages – Claim for – Personal injuries due to road accident – Expert witness statements – Consideration of – Determination of victim's life expectancy for purpose of computing future loss and damages – Pre-trial costs of care – Future costs of medical consultations – Future costs of hospital admissions – Future costs of ambulance services to and from hospital – Future nursing care costs – Various contingencies factored in for estimation of victim's life expectancy*

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ROAD TRAFFIC: *Accident – Negligence – Liability – Contributory negligence – Whether there was evidence that victim motorcycle rider was speeding – Whether lack of driving licence factor to be considered in apportioning liability*

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This appeal originated from the decision of the Sessions Court in a running down action where the plaintiff suffered severe traumatic spinal injury and became paralysed from his chest below. On 14 January 2020, the plaintiff was riding his motorcycle. As he approached Batu 3, Jalan Utara, Sandakan, while on the main road, the first defendant who was driving a lorry from the opposite direction, suddenly, and without warning, made a right turn into a junction by cutting across the plaintiff's rightful path resulting in the motorcycle colliding onto the lorry. The plaintiff pleaded that the injuries he suffered arising from the collision was due to the first defendant's negligence in, *inter alia*, driving the lorry in a careless, inconsiderate and reckless

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manner towards other road users, particularly, the plaintiff and in failing to keep any proper lookout or to have any sufficient regard to the presence of the motorcycle which was proceeding on its rightful lane. The defendants pleaded that the first defendant was at all material times lawfully driving the lorry and had turned right into the junction leading to Sri Taman Batu 3, Sandakan when the lorry was run into by the motorcycle which was travelling at a considerable speed on the left lane. They further pleaded that the first defendant was unable to avoid the collision due to vehicular proximity and sudden consequences. The defendants further pleaded that the collision occurred either solely, or alternatively, was contributed by the negligent, rash and dangerous acts of the plaintiff in, *inter alia*, failing to exercise and maintain proper and effective control of the motorcycle at all material times and riding the motorcycle negligently, reckless and dangerously in the circumstances. The Sessions Court allowed the plaintiff's claim but apportioned 20% liability on him for contributory negligence on these grounds: (i) there was no evidence that the plaintiff had attempted to stop or attempted to brake or sound the horn to warn the first defendant as he was approaching the junction, indicating that the plaintiff was riding the motorcycle at a speed contrary to the conditions of the road; and (ii) the fact that the plaintiff was without a driver's license at the time of the collision. The plaintiff appealed against the whole of the Sessions Court's decision while the defendants cross-appealed on the issue of quantum relating to future costs of care which had been allowed by the Sessions Court.

Held (allowing plaintiff's appeal with costs; dismissing defendants' cross-appeal):

(1) There was no evidence led by the defendants that the plaintiff had been speeding. The investigating officer, PW4, testified that during her investigation, the first defendant had given a statement that he did not see the motorcycle and that he had suddenly gone into the right lane causing the plaintiff to be surprised and not being able to avoid the lorry. Had the Sessions Court Judge ('SCJ') taken into consideration the evidence of the investigating officer and appreciated the first defendant's own concurrence as to how the accident had happened, it would have been apparent that the defendants' pleaded defence that the plaintiff had been speeding was not made out. Further, it was crystal clear from the case of *Ahmad Zulfendi Anuar v. Mohd Shahril Abdul Rahman*, that unless shown to be the proximate cause of the injuries, the lack of driving licence on the part of the plaintiff ought not to be a factor to be considered in apportioning liability. (paras 12-19)

(2) In determining the plaintiff's life expectancy for the purpose of computing future loss and damages, the plaintiff's expert witness, PW5, a consultant neurosurgeon, an expert within the meaning of s. 45 of the

A Evidence Act 1950, had referred to the table published by the National Spinal Code Injury Statistical Centre, Birmingham, Alabama and based on it, the plaintiff's life expectancy would be in the region of 45.1 years. However, due to the development in the past decade in the medical field and development of new equipment, an increase of 10% was expected, making the plaintiff's life expectancy to 49.6 years. There was merit in the plaintiff's submission that a fair multiplier in the circumstances would be to fix it at 44 years which was the median between 49.6 years and 40.1 years. (paras 22-34)

(3) The plaintiff had claimed for RM17,600 as pre-trial costs of care but this was not granted by the Sessions Court on the ground of duplicity with the claim for caregiver/helper/maid. The plaintiff's mother was a homemaker and had to take care of the plaintiff although her own health was failing as she was suffering from hypertension, high cholesterol and was diabetic. She had to carry the plaintiff whenever she had to clean him and this had caused pains in her body. However, out of the 16 months claimed by the plaintiff for this item, two months ought to be deducted as the plaintiff was being treated in the hospital during that time. Herein, this court awarded RM15,600 as pre-trial costs of care for 14 months. (paras 35-40)

(4) The plaintiff had claimed the sum of RM33,000 for future costs of medical consultations in private institutions. However, there was no private hospital in Sandakan or in the whole of Sabah offering rehabilitation treatment, which was only available in public hospitals. While PW5 said there was one in Kuala Lumpur and in Melaka, it was hardly reasonable (costs and logistic wise) for the plaintiff to seek treatment there in his condition. In addition, there was no claim by the plaintiff pertaining to travels between Sabah and Kuala Lumpur or Melaka for that purpose, for instance, air travel expenses and so forth. While it was reasonable for the plaintiff to seek medical treatment in private hospitals if the public hospitals could not accommodate him due to the number of patients, the lack of beds or physicians, there was nothing before the court to suggest that the option of going over to Kuala Lumpur or Melaka was a viable option. This claim was disallowed. (paras 43-47)

(5) The claim for future costs of physiotherapies, future costs of occupational therapy, and future costs of medical consultations, were inter-related in that they were all in relation to the rehabilitation treatment inquired by the plaintiff. In the premises and in good conscience, the sums of RM86,400 were not justifiable and were disallowed. (paras 48-50)

(6) The plaintiff had claimed the sum of RM8,800 for future costs of counselling for family members. While PW5 opined as such, his expertise and experience did not pertain to psychology. Thus, his opinion that 'caring for such patient is considered as an emotional paradox, difficult to elaborate and cope with which makes the caretaker feel imprisoned in a sense of guilt, regrets and memories, determining inability to react to this stressful event' was not that of an expert. Hence, there was no support for this claim. (paras 51 & 52)

(7) The plaintiff had claimed RM660,000 for future costs of hospital admissions, which was estimated to be RM10,000 per visit. This item was not allowed by the Sessions Court. The plaintiff would be required to be warded at least once a year for infection or seizure. However, there was no compelling reason for the plaintiff to seek medical treatment in a private hospital for an infection or seizure as he would be, by all accounts, receiving treatment in the public hospital for rehabilitation. There was no reason to disturb the Sessions Court's decision on this claim. (paras 54 & 55)

(8) The plaintiff's claim for future costs of ambulance services was RM376,000 while the defendants' expert, DW1, gave an estimation of RM300 per trip. The plaintiff was a rehabilitation patient with Duchess of Kent Hospital and it would be unreasonable to assume that such costs would be borne by the hospital given the frequency at which the plaintiff would be required to go to the hospital. The hospital's ambulance service could not be relied on to cater for the plaintiff's needs as and when he requires it. DW1's estimation of RM300 per trip did not take into account the return trip, thus, RM500 was recommended for a return trip. This claim was allowed. (paras 53-59)

(9) For future costs of equipment for personal hygiene, the plaintiff claimed for the sum of RM1,347,000 for: (i) padded reclining shower chair; and (ii) consumables. A commode chair, which is typically used in place of a toilet, was unsuitable for the purpose of bathing someone in the plaintiff's condition. The claim for the padded reclining shower chair in the sum of RM27,000 was reasonable. As regards consumables, consisting of diapers, disposable dressing sets, gloves, *etc*, it was estimated to be between RM1,500 to RM2,500. Taking into account inflation and the fact that the said sum of RM2,500 was to cover the whole of the plaintiff's life expectancy, it was reasonable. The sum of RM1,320,000 was therefore allowed. (paras 63-69)

(10) The plaintiff would require a 24-hour carer even if he was warded in the hospital for rehabilitation process. Thus, duplicity or overlapping of claims did not arise. It was reasonable to award the plaintiff the sum of

RM2,376,000 comprising of: (i) maid or helper at RM1,500 per month x 12 months x the multiplier of 44 years (RM792,000); and (ii) trained nurse at RM3,000 per month x 12 months x the multiplier of 44 years (RM1,584,000). (paras 80-82)

(11) As regards the defendants' cross-appeal in relation to the award for future costs of care totalling RM2,200,666.33, PW5 had factored in various contingencies in his estimation of the plaintiff's life expectancy such as: (i) infection especially respiratory or urinary infection; (ii) other medical illnesses such as cardiac status; (iii) nutrition status; (iv) mobility; (v) electrolyte imbalance; (vi) endoctrine function; and (vii) level of care. There was thus no merit in the cross-appeal by the defendants. (paras 85-90)

Case(s) referred to:

Ahmad Zulfendi Anuar v. Mohd Shahril Abdul Rahman [2022] 9 CLJ 307 CA ***(refd)***
Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v. Ahmad Thaqif Amzar Ahmad Huzairi & Other Appeals [2022] 10 CLJ 209 CA ***(refd)***
Lim Poh Choo v. Camden And Islington Area Health Authority [1980] 1 AC 174 ***(dist)***
Majuikan Sdn Bhd v. Barclays Bank Plc [2014] 9 CLJ 337 CA ***(refd)***
Mohd Shahril Abdul Rahman v. Ahmad Zulfendi Anuar [2021] 8 CLJ 292 HC ***(refd)***
Nui Chai Kian v. Hasbi Omar [2021] 7 CLJ 281 HC ***(not foll)***
Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(dist)***
Pantai Medical Centre Sdn Bhd v. Fareed Reezal Arund & Another Appeal [2022] 2 CLJ 173 CA ***(refd)***
PP v. Muhamad Sulaiman [1982] CLJ 540; [1982] CLJ (Rep) 292 FC ***(refd)***
Tan Cheong Poh & Anor v. Teow Ah Keow [1996] 3 CLJ 665 CA ***(refd)***
Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 45

For the appellant - Eow Ee Pei; M/s PJ Perira & Dasan
For the respondents - Sa'adah Abdul Aziz; M/s Lee & Aziz

Reported by Suhainah Wahiduddin

JUDGMENT

Celestina Stuel Galid J:

Introduction

[1] This appeal originated from the decision of the Sessions Court in a running down action where the plaintiff suffered severe traumatic spinal injury and became paralysed from his chest below.

[2] The Sessions Court allowed the plaintiff's claim but apportioned 20% liability on him for contributory negligence. The plaintiff appealed against the whole of the Sessions Court's decision while the defendants cross-appealed on the issue of quantum relating to future costs of care, which was allowed by the Sessions Court.

[3] The parties shall be referred to herein as they were in the court below.

The Plaintiff's Version Of The Collision

[4] On 14 January 2020, the plaintiff, who was then 21 years old, was riding his motorcycle with the registration number SYC4641 ("the motorcycle") from the direction of Indah Jaya, Batu 4, heading towards Sandakan town. As he approached Batu 3, Jalan Utara, Sandakan, while on the main road, the first defendant, who was driving a lorry bearing the registration number SD5754E ("the lorry") from the opposite direction suddenly and without any warning made a right turn into a junction by cutting across the plaintiff's rightful path resulting in the motorcycle colliding onto the lorry.

[5] The plaintiff pleaded that the injuries he suffered arising from the collision were due to the first defendant's negligence as particularised below (*verbatim*):

(a) Failing to keep any or any proper lookout or to observe or heed the Plaintiff;

(b) Driving without due care and attention;

(c) Failing to keep any or any proper lookout or to have any or any sufficient regard to the presence of the Motorcycle which was proceeding on its rightful lane;

(d) Driving at a speed that was excessive under road traffic regulations and/or excessive in the circumstances;

(e) Failing to give the Motorcycle to pass through its right of way;

(f) Failing to ensure that it was safe to do so before turning into the junction;

(g) Failing to see the Motorcycle in time or at all;

(h) Failing to slow down, stop or swerve or steer or to manage or control the Lorry or to apply his brake adequately or at all so as to avoid colliding into the Motorcycle;

(i) Failing in the circumstances to exercise or maintain any or any proper or effective or cautious control of the Lorry;

(j) Failing to take any or any adequate care for the safety of the Plaintiff;

A (k) Driving the Lorry in a careless, inconsiderate and reckless manner towards other road users, particularly the Plaintiff; and

(l) Failing to exercise reasonable care, prudence and skill in the circumstances.

The Defendants' Version Of The Collision

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[6] The defendants pleaded that the first defendant was at all material times lawfully driving the lorry and had turned right into the junction leading to Sri Taman Batu 3, Sandakan when the lorry was run into by the motorcycle which was travelling at a considerable speed in the left lane. They further pleaded that the first defendant was unable to avoid the collision C due to vehicular proximity and sudden consequences.

[7] The defendants further pleaded that the collision occurred either solely or alternatively was contributed by the negligent, rash and dangerous acts of the plaintiff as particularised below (*verbatim*):

D (a) Failed to heed the presence and proximity of the Isuzu Garbage Truck lawfully negotiating the right turn into the junction leading into Sri Taman Batu 3, Sandakan and lawfully making the cross of the dual lanes of Jalan Utara *via* a designated turn along Jalan Utara – in sufficient time or at all, so as to avoid colliding with it;

E (b) Rode the motor-cycle too fast along the left lane of Jalan Utara in the direction of Sandakan Town, fronting the junction leading into Sri Taman, Batu 3, Sandakan in full view of the Isuzu Garbage Truck that had utilized a designated turn along Jalan Utara and had displayed its indicators prior to lawfully negotiating the right turn into the junction leading to Sri Taman Batu 3, Sandakan and F lawfully making the cross of the dual lanes of Jalan Utara;

(c) Collided with the rear left portion of the Isuzu Garbage Truck as it negotiated the right turn into the junction leading to Sri Taman Batu 3, Sandakan *via* the designated turn along Jalan Utara and lawfully making the cross of the dual lanes of Jalan Utara;

G (d) Failed to exercise and maintain proper and effective control of the motorcycle at all material times;

(e) Failed to avoid colliding with the Isuzu Garbage Truck;

(f) Rode the motorcycle negligently, recklessly and dangerously in the circumstances.

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Items Not Appealed Against

[8] Although the plaintiff's notice of appeal was against the whole of the Sessions Court's decision, learned counsel had, in submission, indicated that they would not be appealing against the awards in respect of the following I items:

(i) general damages in the sum of RM423,500;

(ii) loss of future income in the sum of RM153,600;

(iii) costs of sundry medical supplies, adult diapers and toiletries in the sum of RM357.40; and

(iv) costs of medical reports in the sum of RM640.

[9] The Sessions Court's awards on these items therefore remained.

This Court's Decision – On Liability

[10] The only issue as regards liability was whether the Sessions Court was correct to have apportioned 20% liability on the plaintiff for contributory negligence.

[11] The Sessions Court premised its decision on this issue on two grounds. Firstly, the learned Sessions Court Judge ("LSCJ") made a finding that there was no evidence that the plaintiff had attempted to stop or attempted to brake or sound the horn to warn the first defendant as he was approaching the junction. The LSCJ opined that this indicated that the plaintiff was riding the motorcycle at a speed contrary to the conditions of the road, namely that there was a junction and that it was at night. Secondly, the LSCJ took into consideration the fact that the plaintiff was without a driver's license at the time of the collision.

[12] Now, notwithstanding the pleaded defence of the defendants that the plaintiff had been speeding, it was not in dispute that there was no evidence led by them to suggest so. This much was admitted by learned counsel for the defendants in her written submissions before the Sessions Court. What was submitted was that the plaintiff would have been riding fast and or was speeding for otherwise he would have been able to avoid colliding into the lorry.

[13] With respect, not only such proposition not supported by any evidence, it was contrary to the evidence led during the trial. As rightly pointed out by learned counsel for the plaintiff, the LSCJ appeared to have ignored the evidence by the investigating officer, PW4 who did not agree to the same proposition when cross-examined on the matter. More importantly, the LSCJ further failed to consider that the first defendant had himself testified in examination-in-chief that he was unsure if the motorcycle had been speeding or otherwise.

[14] Additionally, PW4 had testified that during her investigation, the first defendant had given a statement that he did not see the motorcycle and that he had suddenly gone into the right lane, causing the plaintiff to be surprised and not being able to avoid the lorry. When confronted about PW4's said statement, the first defendant even agreed to it and was not even re-examined on it.

[15] In my view, had the LSCJ taken into consideration the evidence of the investigating officer and appreciated the first defendant's own concurrence as to how the accident had happened, it would have been apparent that the defendants' pleaded defence that the plaintiff had been speeding was not made out. Even if the LSCJ had given weight to whatever circumstantial evidence there was in coming to his conclusion as submitted by learned counsel for the defendants, with respect, such conclusion was erroneous as it was made without also taking into consideration the direct evidence as referred to above.

[16] Next, the issue regarding the plaintiff's lack of driving licence. The LSCJ took this matter into account when apportioning liability on the plaintiff for contributory negligence. This was very much like the stand taken by the High Court in *Mohd Shahril Abdul Rahman v. Ahmad Zulfendi Anuar* [2021] 8 CLJ 292; [2021] 12 MLJ 36, where the learned Judicial Commissioner varied the apportionment by the Sessions Court from 30:70 to 40:60.

[17] There, there was a finding by the Sessions Court that the plaintiff was himself negligent in coming out of the junction in a speeding manner and that was the reason why the Sessions Court apportioned 30% of the liability against the plaintiff. The High Court did not disturb this finding of fact but the court went on to consider the issue of whether the fact that the plaintiff did not have a motorcycle licence at the time of the accident as a factor to increase the apportionment to 40%. After having considered the authorities, the learned Judicial Commissioner concluded that it would not be right to not penalise the plaintiff who was found to be in breach of the law by not taking that factor into account.

[18] However, on further appeal, the Court of Appeal in *Ahmad Zulfendi Anuar v. Mohd Shahril Abdul Rahman* [2022] 9 CLJ 307 had this to say about the High Court's said decision:

> Whilst the application of the maxim *ex turpi causa non oritur actio* means that public policy would defeat any claim which is premised on illegality, a balance must still be drawn based on the specific facts and circumstances of each case. While violation of traffic laws must only be dealt with under the specific laws creating the relevant offences, such as in the Road Transport Act 1987 ('RTA'), the RTA does not contain any provision which restrict, let alone prohibit, the rights of any road user from making personal injury claims by reason of the claimant breaching the RTA, including in respect of the requirement for holding the requisite licence, road tax and insurance.
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> Whilst the absence of licence, road tax or insurance may be proper and admissible evidence, it must be established to have been a contributing cause to the injury suffered by the claimant before it could afford a basis of liability. The absence of licence per se could not be the proximate cause

of the plaintiff's injuries. Although the additional 30% was imposed purely because of the non-compliance with the requirements for driving licence, road tax and insurance, there was no evidence that these breaches had any causal connection with the accident or were somehow the proximate cause of the same. The non-holding of such licence should not be factored into increasing the liability. It could not be said that the appellant was profiting in any way from his breach of the RTA where licensing, road tax and insurance was concerned. As such, the additional 30% liability apportioned by the High Court to the appellant could not stand and the apportionment as determined by the SC at 70% against the respondent and 30% against the appellant was restored.

[19] It was submitted by learned counsel for the defendants that the said case was distinguishable as the present case did not involve an additional imposition of liability. Respectfully, the legal principle as held in the above case is crystal clear in that unless shown to be the proximate cause of the injuries, the lack of driving licence on the part of the plaintiff ought not to be factor to be considered in apportioning liability.

[20] As for the defendants' reliance on the High Court case of *Nui Chai Kian v. Hasbi Omar* [2021] 7 CLJ 281, as rightly pointed out by learned counsel for the plaintiff, firstly, it was not binding on this court. Further, the court therein did not have the benefit of the decision of the Court of Appeal in *Ahmad Zulfendi Anuar v. Mohd Shahril Abdul Rahman* (*supra*), it having been decided prior thereto. In addition, there, the court made a finding based on the plaintiff's own admission that the plaintiff had failed to adjust his speed at the intersection, which was contrary to s. 23 of the Highway Code, which required him to "adjust his speed to road conditions so that he will not lose control of his vehicle or cause a collision". Such finding was absent here as discussed above, the finding of the Sessions Court that the plaintiff may have been speeding was unsupported by the evidence.

This Court's Decision – On Quantum Of Damages

Whether The Plaintiff's Witness, PW5 Was An Expert?

[21] Although submitted on before the Sessions Court, this issue was not raised by either party in this appeal. However, in discussing the quantum of damages awarded by the Sessions Court, learned counsel for the defendants had, although vaguely, challenged PW5's status as an expert in the field of rehabilitation and regeneration medicine. This court therefore directed parties to address this issue in submissions.

[22] PW5 was a Consultant Neurosurgeon in the Department of Neurosurgery of Queen Elizabeth Hospital II in Kota Kinabalu, Sabah and had been working with the hospital since 2004. He had obtained MBBS from Mangalore University, FRCS from the University of Edinburgh, FRCS (Surgical Neurology) from the United Kingdom and Fellowship in Spine from Cambridge University.

[23] PW5 further testified that he had been in the medical profession since 1987 and was specialising in neurosurgery and spinal surgery. As at the date of giving evidence, he had prepared at least 12 medical impairment reports and had testified "roughly about seven times" in relation to motor vehicle accidents. PW5 did, however, agree in cross-examination that he was not a "Rehab Specialist".

[24] Now, it should be noted that the LSCJ never made a finding as to whether PW5's evidence was not that of an expert. To this, it was submitted by learned counsel for the defendants that the LSCJ, having adopted the defendant's expert's (DW1) recommendations, hers was the expert evidence preferred and accepted by the Sessions Court.

[25] Section 45 of the Evidence Act 1950 provides as follows:

> (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> (2) Such persons are called experts.

[26] The Supreme Court in the case of *Junaidi Abdullah v. PP* [1993] 4 CLJ 201; [1993] 3 MLJ 217 stated the test to be applied for the purpose of this provision to be:

> First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry?

[27] This test had been earlier explained by the Federal Court in *PP v. Muhamad Sulaiman* [1982] CLJ 540; [1982] CLJ (Rep) 292, where it was held that:

> Although the expert (Chemist) must be 'skilled', he need not be so by special study, he may be so by experience; and the fact that he had not acquired his knowledge professionally goes merely to weight and not to admissibility ... The competency of the expert is a preliminary question for the judge and is one upon which, in practice considerable laxity prevails. Though the expert must be 'skilled', by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

[28] Following the test propounded in the above cases, in my view, there was little doubt that PW5 was an expert within the meaning of s. 45 of the Evidence Act 1950. This, notwithstanding that he was not a "Rehab Specialist". He certainly had the necessary experience in the field of rehabilitation as he had testified that the Neurosurgical Department has been

managing such patient in the neurosurgical ward since 1994 when he started his practice with the visiting rehabilitation physician and that continued to the time of his giving evidence during the trial. Notably, it was never suggested to PW5 during his cross-examination that his experience in managing patients in the neurosurgical ward was insufficient to equip him with the necessary knowledge in rehabilitation.

[29] It was therefore my view that in considering the parties' arguments on the issue of damages, the court was entitled and indeed, it was necessary to consider both the evidence of PW5 and the defendants' expert, DW1. It was a matter of which evidence was preferred based on what had been led before the Sessions Court.

Whether The LSCJ Failed To Determine The Plaintiff's Life Expectancy For The Purpose Of Computing Future Loss And Damages

[30] Notwithstanding that both learned counsel for the plaintiff and the defendants had addressed this issue in their submissions before the Sessions Court, it would appear that the LSCJ did not address his mind on this issue.

[31] It was submitted for the defendants that the only conclusion to be made was that since the LSCJ had accepted and wholly adopted the defendants' submissions on the quantum to be awarded, it meant that the LSCJ had agreed with DW1's estimation of the plaintiff's life expectancy of 40.1 years. With respect, even if that was the case, the LSCJ was bound to state his reasons for so agreeing, given that the plaintiff's expert had also testified as to his opinion on the plaintiff's life expectancy.

[32] PW5 referred to the table published by the National Spinal Cord Injury Statistical Centre, Birmingham, Alabama in the year 2006 and said that based on it, the plaintiff's life expectancy would be in the region of 45.1 years. However, PW5 further opined that due to the development in the past decade in the medical field and development of new equipment, an increase of 10% was expected, making the plaintiff's life expectancy to 49.6 years.

[33] Learned counsel for the plaintiff graciously indicated that both of PW5 and DW1's opinions were based on statistics which had been carried out more than a decade before. What was not disputed, even by DW1, was that the advancement of technology and healthcare would have increased over the past decade. Such was the observation by Vazeer Alam Mydin Meera JC (as he then was) in *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825.

[34] That being the case, I found merits in the plaintiff's submission that a fair multiplier in the circumstances would be to fix it at 44 years, which was the median between 49.6 years and 40.1 years.

Pre-trial Costs Of Care

[35] The plaintiff had claimed for RM17,600 as pre-trial costs of care but this was not granted by the Sessions Court on the grounds of duplicity with that of the claim for caregiver/helper/maid. However, as rightly pointed out by learned counsel for the plaintiff, there was nothing in the Sessions Court's grounds of judgment which explained the reason for this conclusion.

[36] The role of caregivers, which invariably include relatives or next-of-kins, in taking care of patients has been recognised by the courts as compensable – see *Tan Cheong Poh & Anor v. Teow Ah Keow* [1996] 3 CLJ 665.

[37] Of more recent, the Federal Court in *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885 recognised the value of the appellant's mother's care towards the appellant who suffered from quadriplegic spastic cerebral palsy due to the respondents' negligence and noted that tending to the appellant was exhausting and stressful whereby the appellant's mother had to wake up at night to attend to the appellant.

[38] In the present case, the plaintiff's mother (PW2) testified that she has seven children, including the plaintiff. She said that she was a homemaker and that she had to take care of the plaintiff, although her own health was failing as she was suffering from hypertension, high cholesterol and was diabetic. She said that she had to carry the plaintiff whenever she had to clean him but because he was bigger in size than her, this caused pains in her body.

[39] Learned counsel for the defendants had submitted that if at all, the court was to take into account that out of the 16 months claimed by the plaintiff for this item, two months ought to be deducted as the plaintiff was being treated in the hospital during that time.

[40] There was no rebuttal submissions by the plaintiff on the defendants' said contention. As such, I allowed the appeal in respect of this item and awarded RM15,600 as pre-trial costs of care of 14 months.

Whether The Plaintiff's Claims For Future Loss And Damages Were Made Out

[41] The plaintiff contended that the LSCJ erred in failing to consider each and every of the plaintiff's claims under this heading, which were listed in items (2) to (17) of the statement of claim. In particular, the plaintiff contended that the LSCJ did not make an award in respect of the following items but without providing his reasons:

(i) item 3: Future costs of medical consultations;

(ii) item 4: Future costs of physiotherapies;

(iii) item 5: Future costs of occupational therapy;

(iv) item 6: Future costs of future counselling for family members;

(v) item 7: Future costs of hospital admissions;

(vi) item 8: Future costs of ambulance services; and

(vii) item 9: Future costs of medications.

[42] As for the defendants, it was submitted that the same line of reasoning by the LSCJ that the plaintiff was already a patient with Duchess of Kent Hospital undergoing rehabilitation treatment and care ought to apply against making an award in respect of these items. This argument will be considered in the discussion on the specific items below.

Future Costs Of Medical Consultations

[43] The plaintiff had claimed the sum of RM33,000 for future costs of medical consultations in private institutions, the breakdown of which comprised of RM250 per visit x three times per year x the multiplier of 44 years as recommended by PW5. It was contended that unlike DW1, who never practiced in a private institution, PW5's evidence was to be preferred.

[44] It was further contended that the plaintiff was entitled to seek medical treatment in private hospitals as long as the costs were reasonable, citing the case of *Inas Faiqah Mohd Helmi* (*supra*).

[45] This court found no reason to disagree with the said contention, however, it was not in dispute that there was no private hospital in Sandakan or in the whole of Sabah offering rehabilitation treatment, which was only available in public hospitals. PW5 himself testified to that effect.

[46] While PW5 said there was one in Kuala Lumpur and in Melaka, it was hardly reasonable (costs and logistic wise) for the plaintiff to seek treatment there in his condition. In addition, there was no claim by the plaintiff pertaining to travels between Sabah and Kuala Lumpur or Melaka for that purpose, for instance, air travel expenses and so forth. On the contrary, it may be inferred from the claim under item 8, *ie*, future costs of ambulance services that the plaintiff was claiming for such services locally as the costs per trip of RM500 was unlikely so if they were for Sandakan – Kuala Lumpur/Melaka.

[47] As such, in my view, while it was reasonable for the plaintiff to seek for medical treatment in private hospitals if the public hospitals could not accommodate him due to the number of patients, the lack of beds or physicians, there was nothing before the court to suggest that the option of going over to Kuala Lumpur or Melaka was a viable option. In the circumstances, this claim was disallowed.

Future Costs Of Physiotherapies

Future Costs Of Occupational Therapy

[48] At the outset, I would like to acknowledge that when delivering this court's decision, I had ruled in favour of the plaintiff on these two items and had granted the sum of RM86,400 for each of the claims. My decision was on the basis that these items were separately claimed and distinct from item 3 under "future costs of medical consultations", which, as seen above, this court had disallowed. However, these three items were in fact inter-related in that they were all in relation to the rehabilitation treatment required by the plaintiff as opined by both PW5 and DW1.

[49] While learned counsel for the defendants did submit that the LSCJ had found that the plaintiff was already a patient with Duchess of Kent Hospital undergoing rehabilitation treatment and care, with respect, nothing in the LSCJ's grounds of judgment supported this contention. Unfortunately, had it been explored further by learned counsel in this appeal, perhaps this court would have come to a different conclusion earlier on these two items as it has done so subsequently. Notwithstanding that was so, in preparing these grounds, I have come to the conclusion that my findings on these two items would not be justified in view of my findings on item 3 above (see [45]).

[50] In the premises and in good conscience, contrary to my holding earlier, I was of the view that the sums for items 4 and 5 of RM86,400 were not justifiable and therefore, each were disallowed. In so doing, I had called the matter up for mention to inform both counsel and indicated that the plaintiff may take it up further on appeal, should he so wish.

Future Costs Of Counselling For Family Members

[51] The plaintiff had claimed the sum of RM8,800 for this item. PW5 had recommended that counselling be given to family members caring for the plaintiff due to the psychological impact on them. DW1 did not make such recommendation. As noted earlier, the defendants' sweeping submissions on the plaintiff's claims were that the plaintiff was already undergoing rehabilitation treatment and care at Duchess of Kent Hospital. Obviously, this was not an answer to this claim, which was specific to the plaintiff's carers and not the plaintiff himself.

[52] In any event, I did not allow this claim, for the sole reason that while PW5 opined as such, his expertise and experience did not pertain to psychology. Thus, with respect, his opinion that "caring for such patient is considered as an emotional paradox, difficult to elaborate and cope with which makes caretaker feels imprisoned in a sense of guilt, regrets and memories, determining inability to react to this stressful event", was not that of an expert. Hence, there was no support for this claim.

Future Costs Of Hospital Admissions

[53] The plaintiff had claimed for RM660,000 under this item. It was made up of the sum of RM15,000 per visit x one time per year x the multiplier of 44 years. DW1 estimated it to be RM10,000 per visit. This item was not allowed by the Sessions Court but without stating the reason for disallowing it. As already noted above, the defendants' stand was that the plaintiff was already undergoing rehabilitation treatment and care at Duchess of Kent Hospital.

[54] Both of the estimations by PW5 and DW1 were based on costs in private hospitals. They both agreed that the plaintiff would be required to be warded at least once a year for infection or seizure.

[55] My decision on this item would be the same as items 3, 4 and 5 above. I did not find any compelling reason for the plaintiff to seek medical treatment in a private hospital for an infection or seizure as he would be, by all accounts receiving treatment in the public hospital for rehabilitation. I therefore did not see any reason to disturb the Sessions Court's decision on this claim.

Future Costs Of Ambulance Services

[56] The plaintiff's claim under this head was RM376,000 made up of the following:

(i) for therapies: ((RM500 x 2 times x 4 weeks x 6 months) = RM24,000) + ((RM500 x 2 times x 6 months) = RM6,000) + ((RM500 x 12 months x 43 years) = RM258,000);

(ii) for medical consultations: RM500 x 3 times x 44 years = RM66,000;

(iii) for hospital admissions: RM500 x 1 time x 44 years = RM22,000.

[57] DW1 herself gave an estimation of RM300 per trip.

[58] The defendants' stand was that this sum ought not to be claimable as the plaintiff, being a rehabilitation patient with Duchess of Kent Hospital, would be able to use the hospital's ambulance service. Learned counsel for the plaintiff highlighted that no evidence was led to support this contention and that in any event, it was unreasonable to assume that such costs would be borne by the hospital given the frequency at which the plaintiff would be required to go to the hospital.

[59] I found merits in the contentions by the plaintiff. The hospital's ambulance service could not be relied on to cater for the plaintiff's needs as and when he requires it. DW1's estimation of RM300 per trip did not take into account the return trip, thus, in my view, the RM500 recommended for a return trip by PW5 was acceptable. I therefore allowed the claim.

Future Costs Of Medications

[60] Based on PW5's estimation, the plaintiff would expend RM800 per month for medications while DW1 herself estimated it to be between RM500 and RM800. Given that PW5's estimation was within the range estimated by DW1 and there being no contention by the defendants that the lower range estimated by DW1 was to be preferred, I allowed the sum of RM422,400 comprising of the following:

RM800 per month x 12 months x the multiplier of 44 years.

Future Costs Of Positioning And Mobility Device

[61] The Sessions Court had granted the sum of RM457,866.33 for this item. Although the plaintiff sought to reduce the sum of RM363,620, I maintained the Sessions Court's award of the sum of RM457,866.33 as there was no cross-appeal by the defendants against it.

Future Costs Of Respiratory Equipment

[62] Similarly, for this item, the Sessions Court's award in the sum of RM7,200 was maintained as there was no cross-appeal defendants on this award although the plaintiff sought to reduce the sum to RM2,700.

Future Costs Of Equipment For Personal Hygiene

[63] The plaintiff claimed for the sum of RM1,347,000 under this item comprised of the following:

(i) padded reclining shower chair in the sum of RM27,000; and

(ii) consumables in the sum of RM1,320,000.

[64] The LSCJ appeared to accept the recommendation by DW1 of RM960,000 only for consumables.

[65] The "padded reclining shower chair" with an estimated costs of RM3,000 per unit with an estimated lifespan of five years was recommended by PW5. DW1 did not include this in her recommendation but it was not specifically objected to by the defendants during the trial. Neither did learned counsel for the defendants address this item in her submissions or reply submissions in this appeal. What was reiterated was that there was no necessity to make the comparisons between the recommendations of PW5 with that of DW1 as PW5 was not the expert while DW1 was.

[66] First of all, the contention that PW5 was not an expert has been dealt with earlier. Secondly, since there was no recommendation by DW1, it was not a matter for comparison but whether the court was entitled to accept PW5's recommendation in the circumstances. The law is trite – where there is only one expert opinion, the court should not as a rule reject that opinion

outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case – see *Majuikan Sdn Bhd v. Barclays Bank Plc* [2014] 9 CLJ 337; [2015] 1 MLJ 171.

[67] The defendants' own evidence through DW1 in fact provided support for this item where in her report, DW1 noted that for bathing purposes, the plaintiff had to be transferred onto a commode chair. Quite clearly, a commode chair which is typically used in place of a toilet was unsuitable for the purpose of bathing someone in the plaintiff's condition. In the circumstances, in my view, the claim for the padded reclining shower chair in the sum of RM27,000 was reasonable.

[68] As regards consumables, PW5 had estimated the monthly costs of the plaintiff's consumables consisting of, *inter alia*, diapers, disposable dressing sets, gloves, lotions, cream for skin care, urine catheter and urine bag to be between RM1,500 – RM2,500 whereas DW1 estimated the same to be RM2,000 per month.

[69] It should be noted that the sum of RM960,000 recommended by DW1 and accepted by the LSCJ was based on the multiplier of 40.1 years, which as noted earlier in this judgment was based on statistics carried out more than a decade before. In my view, taking into account inflation and the fact that the said sum of RM2,500 was to cover the whole of the plaintiff's life expectancy, it was reasonable. The sum of RM1,320,000 was therefore allowed which calculated as follows:

> RM2,500 (estimated costs per month) x 12 months x the multiplier of 44 years.

Future Costs Of Nutritional Care

[70] The LSCJ had awarded the sum of RM192,000 for this item. Much like the other items, there was no discussion in the LSCJ's grounds of judgment as to how this figure was derived at. I also did not find it in the submissions for the defendants in this appeal.

[71] PW5 had estimated the monthly costs of the plaintiff's nutritional care to be in the sum of RM350 on a weekly basis which would come up to RM800,800 on a multiplier of 44 years (*ie*, RM350 x (52 weeks per year) x 44 years).

[72] PW5 and DW1 appeared to be on the same page that nutritional care was required for the plaintiff. The question for this court was whether it was reasonable to fix it at RM350 per week or at RM400 per month (or RM100 a week). Unfortunately, neither PW5 nor DW1 had given their reason(s) for arriving at their respective conclusions.

[73] I did however allow the plaintiff's claim on this item. Firstly, I was able to gather from the records that PW5 was not challenged on the reasonableness of his estimation. Secondly, when compared with DW1's recommendation of RM2,000 per month (or RM500 per week) for consumables which included diapers, creams, toiletries, urine bag and catheter, lubricants and gloves, I found it unreasonable that the costs of nutritional care should be fixed at a lower amount. I had also considered that in *Pantai Medical Centre Sdn Bhd v. Fareed Reezal Arund & Another Appeal* [2022] 2 CLJ 173, the Court of Appeal allowed the sum of RM700 per month for nutritional care for the plaintiff, who was 44 years old who had suffered serious brain injury arising from the negligence of the defendants which sum was double the one claimed by the plaintiff in the present case.

General Monitoring

[74] The plaintiff had claimed the total sum of RM13,950 for this item comprising of the following, all with the lifespan of five years:

(i) digital blood pressure set – RM3,600 at RM400 per unit;

(ii) digital ear thermometer – RM1,350 at RM150 per unit;

(iii) glucometer – RM5,400 at RM600 per unit; and

(iv) stethoscope – RM3,600 at RM400 per unit.

[75] The LSCJ had allowed the sum recommended by DW1 of RM7,600 but without stating any reason for agreeing with the recommendation.

[76] On my part, I had given consideration to the fact that a more expensive or a "higher end" make of each of these items was unnecessary given the nature of their respective purposes. Thus, I found the recommendations by DW1 were to be preferred and allowed the claim in the total sum of RM10,800 comprising the following:

(i) digital blood pressure set – RM2,700 at RM300 per unit;

(ii) digital ear thermometer – RM900 at RM100 per unit;

(iii) glucometer – RM3,600 at RM400 per unit; and

(iv) stethoscope – RM3,600 at RM400 per unit.

Future Nursing Care Costs

[77] It was submitted for the defendants that the claim ought to be disallowed as it amounted to duplication and overlapping as the plaintiff was already a patient with Duchess of Kent Hospital undergoing rehabilitation treatment and care. Additionally, it was contended that the caregiver (presumably, PW2) could be trained to give similar service as a trained nurse. It was further contended that the LSCJ was "perfectly entitled" to make his conclusions and findings.

[78] While it was true that the LSCJ was indeed entitled to do so, with respect, he was bound to provide his reasons for agreeing with the defendants when he allowed the sum of RM576,000 over the plaintiff's estimation of RM3,432,000. Here, the grounds of judgment were silent as to why this was so.

[79] On my part, I have considered that DW1 herself not only recommended for a trained nurse but also a helper or maid at RM2,500 per month and RM1,200 per month, respectively. PW5 estimated the cost of a helper/maid to be RM920 per month and a trained carer, between RM3,000 to RM5,000 per month, (PW1 also later agreed that in line with the minimum wage in Malaysia, the costs of a helper/maid would be RM1,500 per month).

[80] As to the issue of duplication or overlapping, DW1 herself agreed in cross-examination that the plaintiff would require a 24-hour carer even if he were warded in the hospital for rehabilitation process. Thus, duplicity or overlapping of claims did not arise.

[81] Both PW5 and DW1 were on the same page that the plaintiff would require a helper or maid and a trained nurse or carer. It was in evidence that the plaintiff's mother, PW2 was the primary caregiver of the plaintiff. She testified that she was 54 years old and was suffering from ailments herself. PW2 said that she had to carry the plaintiff, who was bigger in size than her, whenever she bathed or cleaned or moved him, resulting in her suffering from bodily pains thereafter.

[82] In *Fareed Reezal Arund* (*supra*), the Court of Appeal granted the sum of RM6,000 per month towards home nursing care. In the circumstances, in my view, it was reasonable to award the plaintiff the sum of RM2,376,000 comprising of following:

(i) maid or helper at RM1,500 per month x 12 months x the multiplier of 44 years (RM792,000); and

(ii) trained nurse at RM3,000 per month x 12 months x the multiplier of 44 years (RM1,584,000).

Conclusion – The Plaintiff's Appeal

[83] The Federal Court in *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1985] 2 MLJ 22 had said in relation to appeal on quantum of damages as follows:

> Now, in an appeal on quantum of damages it is essential in order to come to a conclusion to bear in mind certain principles which are well established. The appeal court is slow, disinclined to interfere with the Judge's finding merely because the appeal court thinks that if the case had been before it in the first instance a lesser sum would have been awarded. Azmi, CJ (Malaya) (as he then was) giving the Judgment of the Federal Court in *Topaiwah v. Salleh* [1968] 1 MLJ 284, 285 said that:

A … So far as this court is concerned we should, to paraphrase Greer L.J. in *Flint v. Lovell* be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount
B awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case.

C (See *Flint v. Lovell* [1935] 1 KB 354).

In *Greenfield v. London and North Eastern Railway Company* [1945]] KB 89, MacKinnon, LJ had this to say:

The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court
D of Appeal might have given rather more or rather less, but only (1) if the Judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable.

Lord Evershed, MR in *Wilson v. Pilley* [1957] 3 All ER 525, 526 emphasized
E that:

… interference by this court with an award of damages by the trial Judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the county court. No one would suggest that, because this court thought that the
F damages, small in any case, were rather on the low side, this court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one.

We would also refer to *Elliott v. Preston* [1971] 2 L1LR 328, 330 where
G Salmon, LJ had this to say:

Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a court has to be satisfied that it is very wrong. If
H you are satisfied that it is wrong, and seriously wrong, then not only is this court entitled to interfere, but it is its duty to interfere. I would agree … that you cannot say, if it is wrong by such and such a per cent, you do interfere, and if it is not you do not. I think each case stands by itself, and a great deal depends upon the amount of the award.

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> The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the Judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the Judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial Judge.

[84] For all the reasons stated above, I was of the view that this case warranted this court's appellate intervention and accordingly allowed the plaintiff's appeal with costs.

The Defendants' Cross-Appeal

[85] The defendants' cross-appeal was in relation to the award for future costs of care totalling RM2,200,666.33, which the LSCJ had allowed as follows:

(i) future costs of positioning and mobility device in the sum of RM457,866.33;

(ii) future costs of respiratory equipment in the sum of RM7,200;

(iii) future costs of equipment for personal hygiene in the sum of RM960,000;

(iv) future costs of nutrition in the sum of RM192,000;

(v) future costs of general monitoring in the sum of RM7,600; and

(vi) future costs of nursing care in the sum of RM576,000.

[86] It was contended that the LSCJ omitted to state whether one-third be deducted from the total sum of RM2,200,666.33 on account of contingencies and to account for the value of accelerated payment of a lump sum. Reliance was made to the English case of *Lim Poh Choo v. Camden And Islington Area Health Authority* [1980] 1 AC 174, which was applied by the High Court case of *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825; [2014] MLJU 1922.

[87] The plaintiff, on the other hand, referred this court to the decisions of the Court of Appeal in *Kuala Terengganu Specialist Hospital Sdn Bhd & Anor v. Ahmad Thaqif Amzar Ahmad Huzairi & Other Appeals* [2022] 10 CLJ 209 and *Fareed Reezal Arund* (*supra*).

[88] In *Ahmad Thaqif Amzar Ahmad Huzairi* (*supra*), the Court of Appeal opined as follows:

A [61] We have duly considered the above expert evidence by both the experts and all the surrounding circumstances relating to the L/E of the infant plaintiff bearing in mind the treatment and therapies that he could be expected to undergo in the coming years. Our conclusion on this point is that in assessing the correct multiplier, the fair and reasonable L/E premised on the multitude of factors would be 33 years, less ten years since the incident until the conclusion of the trial. *In our considered view, the appropriate multiplier to be applied would be 23 years for future damages without any further 1/3 deduction for contingencies. There was, to our minds, no justification for the proposed further deduction due to the reduced L/E as assessed by the experts.*

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C [62] *We agree with the plaintiff's contention that a further 30% deduction to the multiplier for the damages payable to the plaintiff would raise the risk of under compensation in this particular instance.* We would adopt the principle enunciated in *Page v. Sheernes Steel Company Plc* [1996] PIQR Q26 at p. 8, where Dyson J had said that the discount rate used in the United Kingdom to calculate the multiplier was not a rule of law and that therefore it was not subject to precedent.

D [63] We have also noted the landmark judgment of the House of Lords in *Wells v. Wells; Thomas v. Brighton Health Authority* [1998] 3 All ER 481 at p. 497, the House of Lords had decided that there is no room for a further judicial discount to the life expectancy estimated by the experts. The relevant part of the judgment is set out below:

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> ... Mr Havers conceded that there is room for a judicial discount when calculating the loss of future earnings, when contingencies may indeed affect the result. But there is no room for any discount in the case of whole like multiplier with an agreed expectation of life. In the case of loss of earnings the contingencies can work in only one direction – in favour of the defendant. But in the case of life expectancy, the contingency can work in either direction. The Plaintiff may exceed his normal expectation of life or he may fall short of it ... (emphasis added)

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[89] Firstly, it was quite obvious that the reliance by the defendants on both of the cases they cited, *ie*, *Camden*'s case (*supra*) and *Nurul Husna* (*supra*) was misplaced in the light of the House of Lords' decision in *Wells v. Wells* and the Court of Appeal's in *Ahmad Thaqif Amzar Ahmad Huzairi* (*supra*).

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[90] Additionally, the Court of Appeal in *Fareed Reezal Arund* (*supra*) explained that the one-third deduction ought not to be made when contingencies have been factored in. In this case, PW5 has factored in various contingencies in his estimation of the plaintiff's life expectancy such as (i) infection, especially respiratory or urinary infection; (ii) other medical illnesses such as cardiac status; (iii) nutrition status; (iv) mobility; (v) electrolyte imbalance; (vi) endocrine function; and (vii) level of care. Notably, DW1 appeared to have not taken these into account.

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[91] The above being the case, I found no merits in the cross-appeal by the defendants. It was therefore dismissed with costs.